

STATE OF MICHIGAN
COURT OF APPEALS

WEISS CONSTRUCTION CO, LLC,

Plaintiff-Counter-Defendant-
Appellant/Cross-Appellee,

v

POSEN CONSTRUCTION, INC, and LIBERTY
MUTUAL INSURANCE COMPANY,

Defendants-Appellees,

and

CITY OF DEARBORN,

Defendant-Counter-Plaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED
May 17, 2016

No. 325029
Wayne Circuit Court
LC No. 12-001548-CK

Before: OWENS, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff Weiss Construction Co, LLC (Weiss) appeals as of right from the November 20, 2014 final order entered by the trial court which granted summary disposition to defendant City of Dearborn (Dearborn) on its counterclaim against plaintiff for claim and delivery and common law conversion and dismissed Dearborn's counterclaim for statutory conversion. Plaintiff challenges the trial court's July 3, 2013 order which dismissed all of plaintiff's claims against defendants Dearborn, Posen Construction, Inc. (Posen), and Liberty Mutual Insurance Company (Liberty), based on res judicata. Dearborn cross-appeals challenging the trial court's order dismissing its counterclaim for statutory conversion. For the reasons below, we affirm the trial court's order dismissing Weiss's claim against Dearborn, but reverse the trial court's order dismissing Weiss's claims against Posen and Liberty and remand for further proceedings. We also reverse the trial court's order dismissing Dearborn's counterclaim for statutory conversion and remand for further proceedings.

This case involves claims arising from the construction of a sewer-overflow system in the city of Dearborn. The project was called the Dearborn CSO Contract No. 2 Project (hereinafter "project"). Dearborn owned the project, Liberty provided a payment bond for the project, Posen

was the general contractor, and Weiss was a subcontractor hired by Posen. Weiss provided and installed certain mechanical systems for Posen's use on the project. Weiss alleged that despite its full performance under its agreement with Posen, Posen failed to pay Weiss in full.

Consequently, Weiss filed the present action against Dearborn, Posen, and Liberty. In Count I, Weiss asserted a bond claim against Liberty. Weiss alleged that Posen provided Dearborn with a payment bond, which listed Liberty as the surety. The bond was for the protection of claimants supplying labor and materials for the project, which included Weiss. Accordingly, Weiss asserted that Liberty is indebted to it for the mechanical systems it provided and installed. In Count II, Weiss asserted a breach of contract claim against Posen for failing to pay Weiss for the mechanical systems it provided and installed. Finally, in Count III, Weiss asserted an unjust enrichment claim against Posen and Dearborn, arguing that they were unjustly enriched by Weiss's installation of the mechanical systems.

Dearborn filed a counterclaim against Weiss, asserting claims for claim and delivery, statutory conversion pursuant to MCL 600.2919a, and common law conversion arising from property Weiss was in possession of that Dearborn alleged belonged to it.

Dearborn, Posen, and Liberty moved for summary disposition based on res judicata, which the trial court granted. Posen had filed a lawsuit against Dearborn in 2009 related to construction delays on the project, which was resolved through case evaluation. The trial court found that although Weiss's name was not mentioned in the 2009 complaint, exhibit A to the complaint detailed Posen's damages and listed Weiss as part of that claim, which the trial court found was the exact claim for damages Weiss asserted in the current litigation. The trial court also determined that Dearborn's counterclaim was barred by the doctrine of res judicata, finding that any counterclaims that could have been asserted to Weiss's claim should have been asserted in the 2009 litigation. However, after reconsidering its order upon Dearborn's motion, the trial court granted summary disposition in favor of Dearborn on its claim and delivery and common law conversion claims, but dismissed Dearborn's statutory conversion claim.

On appeal, Weiss argues that the trial court erred by concluding that the current action was barred by the doctrine of res judicata. We review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). We consider "the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party," and we will affirm a trial court's decision to grant summary disposition "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Additionally, we review de novo the question of whether the doctrine of res judicata bars a subsequent action. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

The doctrine of res judicata bars a subsequent cause of action when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* at 121. The parties

agree that the prior 2009 action was decided on the merits, but dispute the other two elements of *res judicata*.

With respect to the second element, Weiss disputes that it was in privity with Posen. “To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.” *Id.* at 122. This generally “requires both a ‘substantial identity of interests’ and a ‘working functional relationship’ in which the interests of the nonparty are adequately presented and protected by the party in the litigation.” *Id.* (citation omitted). A perfect identity of the parties is not required. *Id.*

With respect to the third element, *res judicata* “bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Id.* at 121. One way to determine the applicability of *res judicata* is to apply the “same transaction” test, which provides that “the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.” *Id.* at 124 (quotation marks and citation omitted). “Whether a factual grouping constitutes a transaction for purposes of *res judicata* is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit. . . .” *Id.* at 125, quoting 46 Am Jur 2d, Judgments 533, p 801.

We conclude that the doctrine of *res judicata* bars Weiss’s claim against Dearborn, but does not bar Weiss’s claims against Posen and Liberty. The disposition of Posen’s claims against Dearborn arising from delays in the project precludes Weiss’s instant claim of unjust enrichment against Dearborn. Although Weiss was not a party to the previous lawsuit, Weiss and Posen are privies. Posen hired Weiss as a subcontractor to provide mechanical systems for Dearborn’s sewer project. Weiss did not have a contract with Dearborn. Contrary to Weiss’s argument, its contractual relationship with Posen is significant because the money Weiss now claims that it is owed for damages it sustained by providing and storing equipment for the project arise from its contractual relationship with Posen. When the project became delayed, Posen filed the previous action against Dearborn seeking to recover damages for the delay, not only for itself, but also for its subcontractors so that it could satisfy its contractual obligations.

Specifically, Posen filed the 2009 suit against Dearborn to remedy acts or omissions by Dearborn that required adjustments of contract price and time and that constituted breaches of contract by Dearborn. Posen further alleged that it filed suit against Dearborn because of contract costs and damages suffered as a result of the changes on the project ordered by Dearborn, defective plans, differing site conditions, and suspensions and delays. Posen alleged that it encountered excusable delays caused by Dearborn. Posen alleged breach of contract, breach of contract—warranty specifications, breach of contract—differing site conditions, breach of contract—delay, and quantum meruit. Posen sought damages under the contract, including a time extension and other relief. Posen attached an exhibit to its 2009 complaint, which stated that part of its damages included those incurred by Weiss. Weiss presented Posen with a chart detailing its damages per Posen’s request. Those damages are virtually identical to the damages Weiss now alleges that it is owed from Dearborn. Although Weiss asserts a few additional claims for damages, they are costs arising from the delay that were incurred before the action was settled by case evaluation. Posen also asserted a claim for quantum meruit, as Weiss does in

the instant action. Therefore, Posen previously represented the same legal right Weiss now asserts against Dearborn.

Nevertheless, Weiss argues that Posen did not adequately represent its interests because Weiss felt that Posen was responsible for the delay and Posen felt that Dearborn was responsible for the delay. However, Posen invited Weiss to participate in the previous action and there was evidence that Weiss was aware of the previous action. If Weiss felt that Posen did not adequately represent its interests against Dearborn, it could have intervened. Posen clearly represented Weiss's interests by asserting Weiss's damage claim that it submitted to Posen as a result of the project delay. Therefore, *res judicata* bars Weiss's claims against Dearborn.

Res judicata, however, does not bar Weiss's claims against Posen and Liberty. Although Posen and Weiss were privies, Weiss could not have brought its instant claims in the previous action. In the previous action, Posen sought additional time and funds from Dearborn to complete the project, which Posen alleged that Dearborn delayed. As a result of the delay, Posen and its subcontractors had incurred additional costs. The previous action addressed damages arising from the contract between Posen and Dearborn. As Posen acknowledges, it represented Weiss's interests in that action to recover damages *from Dearborn* arising from the project delay. While it is true that Weiss's damages in the instant action arise out of the same facts as the previous action, i.e., the delay in the project, the previous action did not involve Posen's liability to Weiss under their subcontract for damages sustained as a result of the delay. At the time, Weiss did not know that Posen would not pay Weiss for damages it incurred from the delay. In fact, Posen wrote Weiss various letters insisting that Weiss provide Posen with a detailed damages account so that Posen could add it to its payment applications that it was submitting to Dearborn to in turn pay Weiss. The previous action clearly addressed Dearborn's liability to Posen and Weiss, as Posen's subcontractor, under the contract Dearborn had with Posen, and it was not related in time, space, origin, or motivation to the issue in the instant action, which is Posen's liability to Weiss under their subcontract for damages sustained as a result of the project delay. While there are certainly issues in the previous action that will be relevant to the instant action between Weiss and Posen, and Liberty as Posen's surety, the doctrine of *res judicata* does not apply.

Alternatively, Posen argues that summary disposition is appropriate because there was a "pay if paid" clause in its subcontract with Weiss, which prevented Posen from paying Weiss. Posen argues that it could only pay Weiss what Dearborn paid Posen. While Posen is correct that the subcontract contains this clause, there is clearly a question of fact as to what Weiss is owed, and the trial court never addressed this issue below. Rather, the trial court's opinion focused on *res judicata*.

Posen also argues that it is undisputed that it paid Weiss for everything that Dearborn paid Posen, so summary disposition is still appropriate. Posen points to the deposition of Louis Pighin, Weiss's project manager, who testified that Weiss was paid for the material that it installed. However, Weiss is alleging damages for the materials and equipment it procured for the project and stored, but not necessarily installed. Posen also points out that the damages Weiss alleges in the instant action are the same as those "passed through" Posen in the previous action against Dearborn. While this is true, Posen never paid Weiss from the case evaluation settlement Posen received. The record reveals that Dearborn wrote a \$600,000 check to Posen

for the case evaluation settlement on April 29, 2011. Weiss claims that it did not learn of this until it was discovered in the instant action. Posen and Liberty both admit on appeal that they are liable to Weiss for Weiss's pro-rata share of the \$600,000 Posen recovered from Dearborn. Again, there is clearly a question of fact as to what Weiss is owed, and thus, this issue is for the trial court to decide and is prematurely before this Court.

Additionally, despite admitting that it is liable to Weiss for its pro-rata share of the case evaluation settlement, Liberty also makes an alternative argument that the damages Weiss claims in the instant action are outside the scope of the payment bond. Liberty argues that a claimant under the bond can only recover labor, materials, and equipment for use in the performance of the contract. Liberty argues that Weiss's damages are the result of the project delay and not a result of labor or material provided for the contract. Weiss, however, argues that it incurred the costs as a result of procuring and storing the materials as part of the contract. This is clearly a question of fact for the trial court to decide, and given that the trial court did not address this issue, we decline to address this alternative ground for dismissal of Weiss's claim against Liberty.

We next address Dearborn's cross-appeal, in which Dearborn argues that the trial court erred by dismissing its counterclaim against Weiss for statutory conversion. Again, we review de novo a trial court's decision on a motion for summary disposition, *Maiden*, 461 Mich at 118, as well as questions of statutory interpretation. *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015).

Dearborn argues that Weiss converted Dearborn's property to its own use, and was therefore entitled to summary disposition on its statutory conversion claim pursuant to MCL 600.2919a(1)(a), which provides:

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

A plaintiff seeking to recover treble damages by alleging conversion to the defendant's "own use" under MCL 600.2919a(1)(a) "must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose." *Aroma Wines*, 497 Mich at 359. Dearborn relies on *Aroma Wines* to argue that by using the property as leverage against Dearborn for payment, Weiss converted the property to its own use, and thus, there is no question of fact that Weiss was liable for statutory conversion.

In *Aroma Wines*, the plaintiff was renting some of the defendant's climate-controlled warehouse space to store its wine while awaiting sale. *Id.* at 341. The plaintiff fell behind on its monthly payments, and at some point, the defendant moved some of the plaintiff's wine from its warehouse to an uncontrolled environment, contrary to the terms of the contract. *Id.* The defendant admitted that it moved the wine to renovate the warehouse and increase the storage

capacity, but the plaintiff argued that the defendant moved the wine to rent the space to higher-paying customers. *Id.* at 341-342. The plaintiff asserted a claim for statutory conversion under MCL 600.2919a(1)(a), arguing that the defendant converted the plaintiff's wine to its own use when it moved the wine.

After defining "own use," our Supreme Court made clear that it was not making any factual determinations. *Id.* at 360. It was merely deciding whether there was sufficient evidence presented for the fact-finder—in that case, the jury—to conclude that the defendant converted the plaintiff's wine to its own use. *Id.* Affirming this Court's conclusion, the Court concluded that

"[i]f a jury believed the evidence showing that defendant moved plaintiff's wine for its own purposes—whether it be to sell the space to other customers or complete a construction project—or that it used the wine as leverage against plaintiff, it could have determined that defendant converted the wine to its own use." [*Id.* at 361, quoting *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 303 Mich App 441, 449; 844 NW2d 727 (2013).]

Therefore, contrary to Dearborn's argument, the Court did not hold that using the wine as leverage against the plaintiff was sufficient evidence to establish that the defendant converted the wine to its own use, and thus, entitle the plaintiff to a directed verdict. Rather, it was sufficient evidence for the case to be presented to the jury to make that conclusion.

In this case, the trial court erred by dismissing Dearborn's statutory conversion claim. In dismissing the claim, the trial court did not address whether Weiss converted the property to its own use. It only determined that Weiss did not steal or embezzle the property. However, Dearborn presented sufficient evidence for a fact-finder to conclude that Weiss converted the property to its own use, i.e., for a purpose personal to Weiss's interests.

Specifically, Weiss originally purchased the materials and equipment in question pursuant to its contract with Posen to provide and install at the project site for the benefit of Dearborn. Dearborn claims that it paid for the materials and equipment, less the retention fee, and Weiss's general manager, Christopher Fitch, admitted this in his deposition. Fitch testified, however, that Weiss was not paid for the costs of storing and handling the property. Dearborn presented an affidavit from Dean Montrief, a city representative, who attested that before Dearborn terminated Posen's contract, he requested that Dearborn's engineer, a company called NTH Consultants, Ltd., make a demand for possession to Weiss for the materials and equipment, but Weiss refused to turn them over. Fitch understood that Dearborn paid for the materials and equipment through Posen, and testified that in order for Dearborn to get the materials and equipment back Dearborn or Posen needed to "come to some conclusion with us." Fitch admitted that Weiss did not approach Dearborn about the issue because its contract was with Posen.

Although Weiss claims that it believed it was the rightful owner of the materials and equipment, it also acknowledges that Dearborn had paid for them. It is also undisputed that Weiss was providing the materials and equipment for the project, which was owned by Dearborn. The record shows that Weiss was holding the property that belonged to Dearborn until Weiss was paid for the costs to store and handle the property. Although Fitch

acknowledged in his deposition that the dispute was with Posen, with whom it had a contract, it appears that Weiss was wrongfully holding the property in an attempt to force either Dearborn or Posen into paying Weiss for storing and maintaining it. In essence, it was using the property as leverage to ensure it received payment from someone. This certainly creates a question of fact for the fact-finder whether such use was personal to Weiss's interests. However, contrary to Dearborn's argument, this does not mean that Dearborn is entitled to summary disposition in its favor. Rather, as our Supreme Court noted in *Aroma Wines*, it is merely sufficient evidence to overcome summary disposition (or in *Aroma Wines*, a motion for directed verdict), so that the fact-finder may make the factual determinations.

In sum, res judicata bars Weiss's claim against Dearborn, but does not bar Weiss's claims against Posen and Liberty. Therefore, we affirm the trial court's order dismissing Weiss's claim against Dearborn, but reverse its order dismissing Weiss's claims against Posen and Liberty and remand for further proceedings. We also reverse the trial court's order dismissing Dearborn's counterclaim for statutory conversion and remand for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings. City of Dearborn, having prevailed, may tax its costs against Weiss Construction Co, LLC. Weiss Construction Co, LLC, having prevailed, may tax its costs against Posen Construction, Inc. and Liberty Mutual Insurance Company. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens